

**State of California**  
**DEPARTMENT OF INDUSTRIAL RELATIONS**  
**Division of Workers' Compensation**

**NOTICE OF MODIFICATION TO TEXT OF  
PROPOSED REGULATIONS**

(Subject Matter: Workers' Compensation  
SPINAL SURGERY SECOND OPINION PROCEDURE  
Title 8, California Code of Regulations Sections 9788.01 et seq.)

NOTICE IS HEREBY GIVEN that the Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in the Administrative Director by Labor Code §§133 and 5307.3, proposes to modify the text of the following proposed sections of Title 8, California Code of Regulations, adopted as emergency regulations, effective on July 2, 2004:

Section 9788.01	Definitions
Section 9788.1	Employer's Objection to Report of Treating Physician Recommending Spinal Surgery
Section 9788.11	Form for Employer's Objection to Report of Treating Physician Recommending Spinal Surgery
Section 9788.3	Application Procedures
Section 9788.4	Removal of Physicians from the Spinal Surgery Second Opinion List
Section 9788.45	Unavailability of Second Opinion Physicians
Section 9788.5	Random Selection of Second Opinion Physician
Section 9788.6	Examination by Second Opinion Physician or Agreed Second Opinion Physician
Section 9788.8	Time Limits For Providing Reports
Section 9788.91	Authorization of Surgery and Filing of a Declaration of Readiness to Proceed

**PRESENTATION OF WRITTEN COMMENTS AND DEADLINE FOR SUBMISSION  
OF WRITTEN COMMENTS**

Members of the public are invited to present written comments regarding these proposed modifications. **Only comments directly concerning the proposed modifications to the text of the regulations will be considered and responded to in the Final Statement of Reasons.**

Written comments should be addressed to:

Kathleen Llemos  
Department of Industrial Relations  
Division of Workers' Compensation  
Post Office Box 420603  
San Francisco, CA 94142

The Division's contact person must receive all written comments concerning the proposed modifications to the regulations no later than 5:00 p.m. on Thursday, October 28, 2004. Written comments may be submitted by facsimile transmission (FAX), addressed to the contact person at (415) 703-4720. Written comments may also be sent electronically (via e-mail), using the following e-mail address: [dwcrules@dir.ca.gov](mailto:dwcrules@dir.ca.gov).

## **AVAILABILITY OF TEXT OF REGULATIONS AND RULEMAKING FILE**

Copies of the original text and modified text with modifications clearly indicated, and the entire rulemaking file, are currently available for public review during normal business hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding legal holidays, at the offices of the Division of Workers' Compensation. The Division is located at 455 Golden Gate Avenue, 9th Floor, San Francisco, California.

Please contact Ms. Kathleen Llemos, at (415) 703-4600 to arrange to inspect the rulemaking file.

The specific modifications proposed include changes to the text of the emergency regulations adopted effective July 2, 2004 in Title 8, California Code of Regulations, Section 9788.01 (Definitions), Section 9788.1 (Employer's Objection to Report of Treating Physician Recommending Spinal Surgery), Section 9788.11 (Form for Employer's Objection to Report of Treating Physician Recommending Spinal Surgery), Section 9788.3 (Application Procedures), Section 9788.4 (Removal of Physicians from the Spinal Surgery Second Opinion List), Section 9788.45 (newly added Section) (Unavailability of Second Opinion Physicians), Section 9788.5 (Random Selection of Second Opinion Physician), Section 9788.6 (Examination by Second Opinion Physician or Agreed Second Opinion Physician), Section 9788.8 (Time Limits For Providing Reports), Section 9788.91 (Authorization of Surgery and Filing of a Declaration of Readiness to Proceed)

## **DOCUMENTS SUPPORTING THE RULEMAKING FILE**

Print outs of emails, written comments, and a transcript of the public hearing held on September 21, 2004, have been added to the rulemaking file.

## **AUTHORITY AND REFERENCE**

There are no references in addition to the references cited previously,

## **FORMAT OF PROPOSED MODIFICATIONS**

### **Proposed Text for This 15-Day Comment Period on Modified Text**

Deletions from the codified regulatory text are indicated by strike-through, thus: ~~deleted language~~.

Additions to the codified regulatory text are indicated by underlining, thus: underlined language.

The proposed changes to Form 233 (Objection to Treating Physician's Recommendation for

Spinal Surgery) are presented without strikeout or underline in a new form, and the old form is shown with an "X" through it.

## **SUMMARY OF PROPOSED CHANGES**

### **Modifications to Section 9788.01 Definitions**

Section 9788.01 is modified to include CPT procedure code 22899 within the definition of spinal surgery. This change is in response to an accepted comment.

### **Modifications to Section 9788.1 Employer's Objection To Report Of Treating Physician Recommending Spinal Surgery**

Section 9788.1 is reorganized for clarity. Additional subdivisions and subparagraphs are used. It is modified to clarify what means of delivery of the Objection are acceptable, when it will be deemed received by the Administrative Director, and how it may be served on other parties. Added language also acknowledges that different persons will receive mail than will serve the objection, and so separate declarations are required for the use of the person who received the physician's report or has knowledge of the receipt of the physician's report, and the person who serves the Objection. The person who signs the Objection may be a third person. Another language change clarifies that only a represented employee may agree to an agreed second opinion physician. The last change provides that when the parties agree on an agreed physician or when the employer withdraws the objection subsequent to filing the objection, they may notify the Administrative Director by fax instead of by mail. These changes are in response to comments.

### **Modifications to Section 9788.11 Form for Employer's Objection To Report Of Treating Physician Recommending Spinal Surgery**

The Form promulgated by Section 9788.11 is modified to adopt the changes to Section 9788.1. In addition, blanks are added for the optional insertion of the employee's claim number, telephone number, and fax number. The declarations section is modified to include alternate versions of a declaration regarding receipt of the treating physician's recommendation, depending on who executes the declaration. The declaration of service is revised, and the instructions are revised.

### **Modifications to Section 9788.3 Application Procedures**

Section 9788.3 is modified to provide that a physician on the list of second opinion physicians must notify the Administrative Director within 10 days, if any state medical board from whom the physician is licensed, files any accusation or charges against the physician, or imposes any discipline. This change is intended to allow the Administrative Director to learn if any disciplinary procedures have been instituted against a second opinion physician after the Administrative Director has ruled the physician is qualified to participate in the program.

## **Modifications to Section 9788.4      Removal of Physicians from the Spinal Surgery Second Opinion Physician List**

Section 9788.4 is modified by renumbering some paragraphs for clarity. It is also modified to clarify one reason for removing a physician from the list, and to provide two additional reasons. Removal for not providing a report within the regulations' time limits has been changed to removal for not completing a report within the required forty-five days, unless the employee failed to attend an examination. The additional reasons are: 1) The physician's declining to accept an assignment, except during times for which the physician had notified the Administrative Director that he/she would not be available; and 2) The physician's having been unavailable for more than 120 days during a one year period.

## **Modification: Addition of Section 9788.45      Unavailability of Second Opinion Physician**

Section 9788.45 is added to provide that a physician may notify the Administrative Director that he/she will be unavailable for periods of time, and unable to accept assignments for second opinions. There have been problems with second opinion physicians not advising the Administrative Director that they would be unavailable for periods of time, resulting in delays when they have been selected for a second opinion.

## **Modifications to Section 9788.5      Unavailability of Second Opinion Physician**

Section 9788.5 is modified to acknowledge the common practice of the physician attempting to arrange by telephone a mutually convenient time for an appointment. The practice is allowed, and the physician is required to send a confirming written notice of appointment details. A new paragraph (e) is added to clarify that a second opinion physician who has notified the Administrative Director of his/her unavailability, will be excluded from any selection process during the time of unavailability.

## **Modifications to Section 9788.6      Examination by Second Opinion Physician or Agreed Second Opinion Physician**

Section 9788.6 is modified to provide that for an unrepresented employee, there shall be no communication between any party and the second opinion physician, except for matters of scheduling, furnishing of records, availability of the report, and the examination itself. Also, the employer is to serve the employee with records and reports that have not previously been served. In response to a comment, the extension of time to complete the process in cases where the employee has failed to attend an examination has been reduced from 45 days to 30 days.

## **Modifications to Section 9788.8      Time Limits For Providing Reports**

Section 9788.8 is modified to provide that the second opinion physician shall serve the report on the Administrative Director, and that service on all parties shall be at the same time. Routinely obtaining copies of the reports will allow the Administrative Director to monitor the content of the reports, analyze how well the second opinion physician process is working, and learn when reports are not timely completed. Requiring that all parties be served at the same time will reduce administrative burdens upon the Administrative Director in answering inquiries about the status of reports not yet received.

## **Modifications to Section 9788.91      Authorization of Surgery and Filing of a Declaration of Readiness to Proceed**

Section 9788.91 is modified to clarify that that if the second opinion physician concurs with the recommendation of the treating physician, the surgery is to be authorized. It also will now provide a time limit of three working days in which to communicate the authorization. Comments had sought that authorization be required within one day, a time period which the Division finds unnecessarily short in view of the forty-five day statutory allowance of time to complete the second opinion process. The modification also provides that the declaration of readiness must be filed within fourteen days of receipt of the second opinion physician report, where no time limit had been previously specified. The statute requires that a declaration of readiness be filed, but specifies no time limit. The Division determined that fourteen days would be a reasonable time for the employer to review the report, consult with counsel, and make a decision regarding the surgery. The section is also modified to clarify that an employer need not file a declaration of readiness if the employer authorizes the surgery.